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In The

Supreme Court of the United States

OCTOBER TERM, 1957

No. 558, Misc.

JAMES R. WALKER, JR.
PETITIONER,

VS.

THE STATE OF NORTH CAROLINA
RESPONDENT.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Petitioner, James R. Walker, Jr., by means of an application to this Court for a Writ of Certiorari, seeks to have reviewed a judgment or order of the Supreme Court of North Carolina entered on November 19th, 1957, which denied Petitioner permission to apply to the Superior Court of Northampton County, a Court of general jurisdiction, for a Writ of Error Coram Nobis. The various steps leading to the filing of this Petition are as follows:

(1) Petitioner convicted of an assault on a female, he being a male person over 18-years of age, at the August Term, 1956, of the Superior Court of Northampton County (See Record: No. 147, Sixth District, Supreme Court of North Carolina - State v. James R. Walker, Jr.) Petitioner ordered to pay a fine of $500.00 and costs.

(2) The Petitioner did not cause his appeal from this judgment to be docketed in the Office of the Clerk of the Supreme Court within the time required by a mandatory Rule of the Supreme Court of North Carolina and his appeal was dismissed (State v. Walker, 245 N. C. 658; 97 S. E. 2d 219).

(3) Petitioner next tried to have his case reviewed under the North Carolina Post-Conviction Hearing Act (G. S. 15-217. See Appendix) and this was dismissed by the Superior Court (See No. 145, Sixth District, Supreme Court of North Carolina, Fall Term, 1957, State of North Carolina v. James R. Walker, Jr.). Petitioner then sought review of this dismissal by application for Writ of Certiorari made to the Supreme Court of North Carolina (See State Record No. 145, cited above). This application for review by Certiorari was dismissed by the Supreme Court of North Carolina on August 28, 1957, the Court citing the cases of State v. Cruse, 238 N. C. 53; 76 S. E. 2d 320, and State v. Miller, 237 N. C. 29; 74 S. E. 2d 513.

(4) On the 26th day of October, 1957, Petitioner filed in the Supreme Court of North Carolina a Petition applying for permission to file a Petition for Writ of Error Coram Nobis in the Superior Court of Northampton County. The Supreme Court of North Carolina denied this Petition on November 19th, 1957 (No. 150—Sixth District—State v. Walker—"Petition for leave to file Petition for Writ of Error Coram Nobis in the above, entitled case is filed with the following order: Denied Nov. 19, 1957. Rodman, Jr., For the Court."). Petitioner then filed this Petition requesting this Court to grant a Writ of Certiorari to review the action of the Supreme Court of North Carolina in the Coram Nobis proceeding.

FACTS

In his Petition the Petitioner states his version of the ultimate facts, and the Respondent likewise will state its version of the facts in the original case (State Record No. 147) which it is contended the evidence supports, and which the jury followed in arriving at its verdict.

On May 12, 1956, Helen H. Taylor was Registrar of Seaboard Precinct and was engaged in registering persons in a portion of her husband's store which she used for an office. She was sitting at her desk and one Mack Johnson was sitting on the other side of the desk and she was about to give Johnson a test as to reading or writing to determine whether or not he was qualified to register. At this time the Defendant, an Attorney-at-Law, (Petitioner herein) walked into the building accompanied by a man and a woman. Mrs. Taylor asked the Petitioner if he wished to register and Petitioner replied, "No." A portion of Mrs. Taylor's evidence is as follows:

"He had one of those yellow tablets under his arm, and I then said, 'Do you want to see me about something?' and he said, 'Yes'. Then I told him, 'Wait outside until I get through with Mark, that is, through registering him.' The defendant (Petitioner) then stepped forward and shook his finger in my face, and said, 'No, I am waiting right here.' He advanced a step and a half toward me, something like that—a small space.

"Mark was not attempting to read or write the Constitution; he hadn't started. The disturbance stopped Mark; when Walker stepped forward like that, of course, it stopped him. I said that Walker advanced toward me a step or a step and a half and shook his finger in my face, and said, 'No, I am waiting right here.' I said he stepped a step or a step and a half toward me. And at that time I was actually passing upon and attempting to give the applicant what he was supposed to do to register. I was in the act of giving this applicant, Mark Johnson, the examination as to whether he was qualified to register or not. That was being done at the time the defendant (Petitioner) shook his finger in my face and said in a loud

voice, 'No, I am staying right here.' The effect it had on me was to frighten me to the extent that I stopped with Mark and did not dictate any further and I asked Walker to wait outside. The reason I stopped in the performance of my duties was because of the fact of what he said and his advancing toward me.

"I asked the defendant (Petitioner) to wait outside until I could finish with Mark. I asked him that twice and he refused twice. The second time he shook his finger at me again, and said, 'No, I am an attorney and these are my clients and I am waiting right here. I am here to see that you register them. You say they are not qualified and I say they are. They are capable of reading and writing and I say that they are qualified * * * ' He demanded that I put them on the book. He said that he was there to see that I put them on the book, that I register them * * * Sure, I was frightened. I did not know what to expect. I did not have any discussion * * * I was frightened when I was sitting there and he was shaking his finger at me. I stood up because I was frightened. Then I talked to him and tried to get him out. I did not move from behind the desk until he went out." (See evidence of Helen Taylor and William H. Taylor—State Record No. 147).

ARGUMENT

I

THE PETITIONER WAS PROPERLY CONVICTED ACCORDING TO LOCAL STATE PROCEDURE AND SUBSTANTIVE CRIMINAL LAW APPLICABLE TO ALL CITIZENS OF THE STATE.

The Petitioner was not indicted and convicted of any violation of the election laws of the State and any attempt on the part of the Petitioner to interject into these proceedings any question as to the constitutionality of the election laws of the State is but an attempt to draw a red herring across the path of and divert the attention from the primary issues involved.

The Petitioner was indicted and convicted of an assault according to the substantive criminal law of North Carolina dealing with such offenses (G. S. 14-33: Appendix P. 27). There is no allegation or contention on the part of the Petitioner that the Judicial Division of the State Government has singled out his Race in the judicial administration of the law of assaults. We assert that an impartial survey of the assault cases passed upon by the Supreme Court of North Carolina will show that that Court has interpreted and applied the law of assaults to all citizens of the State without any discriminatory or unconstitutional preferences (STATE v. INGRAM, 237 N. C. 197; 74 S. E. 2d 532 - Colored man charged with assault on white woman). Aside from certain statutory definitions of assault, the ordinary assault as charged against Petitioner is a common-law offense in North Carolina with statutory punishment (G. S. 14-33) according to the various qualities of aggravation connected with the assault. Convictions of this nature depend largely upon questions of fact to be resolved by the jury, and the decisions of North Carolina support Petitioner's conviction.

STATE v. McIVER, 231 N. C. 313; 56 S. E. 2d 604;
STATE v. SUTTON, 228 N. C. 634; 46 S. E. 2d 310;
STATE v. WILLIAMS, 186 N. C. 627; 120 S. E. 224.

This Court has said in substance that the 14th Amendment "leaves the States free to enforce their criminal laws under such statutory provisions and common-law doctrines as they deem appropriate, and does not permit a party to bring to the test of a decision in this Court every ruling made in the course of a trial in a State Court."

BUCHALTER v. NEW YORK, 319 U. S. 427; 87 L. Ed. 1492;
AVERY v. ALABAMA, 308 U. S. 444; 84 L. Ed. 377;
SNYDER v. MASSACHUSETTS, 291 U. S. 97; 78 L. Ed. 674;
PALKO v. CONNECTICUT, 302 U. S. 319; 82 L. Ed. 288;
CHAPLINSKY v. NEW HAMPSHIRE, 315 U. S. 568; 86 L. Ed. 1031.

II

THE DISMISSAL OF PETITIONER'S APPEAL WAS NOT IN VIOLATION OF CONSTITUTIONAL RIGHTS AND IS A MATTER OF LOCAL STATE PROCEDURE.

The Opinion of the Supreme Court of North Carolina (STATE v. JAMES R. WALKER, JR., 245 N. C. 658; 97 S. E. 2d 219) explains in detail why the Petitioner's appeal based on State Record No. 147 was dismissed. The Rules of Practice of the Supreme Court of North Carolina as to the permissible time in which appeals must be docketed are mandatory (PRUITT v. WOOD, 199 N. C. 788; 156 S. E. 126—STONE v. LEDBETTER, 191 N. C. 777; 133 S. E. 162). These rules "may not be disregarded or set at nought (1) by act of the legislature (COOPER v. COMMISSIONERS, 184 N. C. 615, 113 S. E. 569), (2) by order of the Judge of the Superior Court (WALLER v. DUDLEY, 193 N. C. 354, 137 S. E. 149), (3) by consent of litigants or counsel (STATE v. FARMER, 188 N. C. 243, 124 S. E. 562."

Where an extension of time is so long, either by consent or by order of the Judge, as to put it beyond the power of appellant to have the case ready for hearing as required by the Rules of the Supreme Court the appellant can do only two things: (1) He can get his appeal docketed, regardless of the time extension, as required by the Rules of the Supreme Court; or (2) He can docket the Record Proper and move the Supreme Court for a Writ of Certiorari to preserve the right of appeal. As pointed out by the Supreme Court of North Carolina the Petitioner did not follow either one of these exceptions, and he cannot now complain as to the action of the Court. There is no assertion or contention on the part of the Petitioner that the Supreme Court of North Carolina has administered its dismissal of appeals in any unconstitutional and preferential manner. The cases cited above under subject I, as decided by this Court, support the constitutionality of such a ruling (BROWN v. ALLEN, 344 U. S. 443, 97 L. Ed. 469 - See Headnote No. 44 L. Ed.).

III

THE ORDER OF THE SUPREME COURT OF NORTH CAROLINA, DISMISSING PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI TO REVIEW PETITIONER'S PROCEEDING UNDER THE NORTH CAROLINA POST-CONVICTION HEARING ACT WAS PROPER.

After his appeal to the Supreme Court of North Carolina had been dismissed Petitioner sought to have his case reviewed by the device of the North Carolina Post-Conviction Hearing Act (G. S. 15-217 - Appendix P. 27). As this Court will see from the State Record of this proceeding (NO. 145), Petitioner was clearly not entitled to this remedy, nor does he attempt in this proceeding to raise the constitutional questions which he is now asserting before this Court (See Petition in No. 145, State Record, Page 3). This Petition, or this Proceeding, was properly denied by the Superior Court of Northampton County, and upon application for Certiorari to review the lower court, the Supreme Court of North Carolina properly dismissed the application. This action of the Supreme Court of North Carolina was proper for two reasons: (1) The North Carolina Post-Conviction Hearing Act is not a substitute for an appeal; and, (2) The Petitioner could have and should have raised all of these questions in his original trial and then presented them for review by the Supreme Court of North Carolina upon a properly perfected appeal.

The North Carolina Post-Conviction Hearing Act is an adaptation of the Illinois Post-Conviction Statute, and in the case of STATE v. CRUSE, 238 N. C. 53; 76 S. E. 2d 320, the Supreme Court quoted with approval an excerpt from the opinion of the Supreme Court of Illinois in PEOPLE v. HARTMAN, 408 Ill. 133, as follows:

> "It certainly was not the intent of the General Assembly, by the new Act in question, to enable a person convicted of a crime to have a review of ordinary questions of procedure, for which the law already provides a remedy.

by charging that they constitute a denial of constitutional rights."

Again the Supreme Court of North Carolina says, in STATE v. CRUSE, supra,:

> "The statute was enacted for the purpose of providing an adequate, simple and effective post-conviction remedy for persons who have suffered substantial and unadjudicated deprivation of constitutional rights in the original action which resulted in their conviction, because they were prevented from claiming such constitutional rights by factors beyond their control."

The right to an appeal is unqualifiedly given in North Carolina without restriction or limitation to every person convicted of a criminal offense in any court, and there is no limit or condition imposed upon the right of a defendant's counsel to maintain any position, secure a ruling on same and then have the same reviewed by the Supreme Court of North Carolina (STATE v. CRUSE, supra).

In MILLER v. STATE, 237 N. C. 29; 74 S. E. 2d 513, in dealing with the Post-Conviction Hearing Act of this State the Supreme Court of North Carolina points out that the courts must deal with litigants as though they were acting in the persons of their attorneys and that the law confers upon the attorney for the defense in a criminal case the power to take such steps as he deems appropriate and that the law decrees that the accused is bound by his attorney's actions in such matters, and in this connection the Court commented on the Post-Conviction Hearing Act of this State, and said:

> "It is not devised to confer upon an accused, who is defended by counsel of his own selection or competent counsel appointed by the court, a legal privilege, at his own election, to have his rights arising under the common law and the statutes adjudicated at a time of the State's choosing in the original criminal action, and his rights arising under the Constitutions of his State and Nation adjudicated at a subsequent time of his own choosing in another proceeding."

There is no contention on the part of the Petitioner that his counsel were not competent and unable to protect his rights and take the proper steps in the trial of his case.

IV

THE DECISION OF THE SUPREME COURT OF NORTH CAROLINA DENYING PETITIONER'S APPLICATION FOR WRIT OF ERROR CORAM NOBIS IS A VALID AND CONSTITUTIONAL EXERCISE OF ITS LEGAL AUTHORITY AND DID NOT VIOLATE ANY CONSTITUTIONAL RIGHTS OF PETITIONER.

(A)

The status of North Carolina as to literacy test and registration of voters.

From a legal viewpoint we do not think that the laws of North Carolina as to the registration of voters, and the literacy test therein required, has anything whatsoever to do with the case now before this Court. Since, however, the Petitioner attempts to make his basic contention on the alleged invalidity of the Constitution of North Carolina and its statutes relating to the registration of voters, we desire to clarify the situation and to remove the confusion created by the Petitioner.

Prior to April 12th, 1957, the constitutional provision of North Carolina as to a literacy test for registration of voters and the applicable statute thereunder existed as shown in Petitioner's Appendix "E". North Carolina still has the same constitutional provision (N. C. Constitution, Article VI, Sec. 4: Petitioner's Appendix "E"). This constitutional provision does contain a so-called grandfather clause and the provision in this form still exists today. In ALLISON v. SHARP, 209 N. C. 477, 184 S. E. 27, the Supreme Court of North Carolina upheld the validity of the literacy test which required reading and writing a provision of the Constitution in the English language; as to the provisos creating the grandfather clause the Supreme Court of North Carolina thought they were now

obsolete because of the passing of time, the Court said: "The provisos we do not quote, as they are immaterial, the time limit having expired - 1 December, 1908." Effective as of April 12, 1957, North Carolina revised and rewrote G. S. 163-28, struck out the grandfather clause in the statute and provided appeal procedure from a refusal to register, and it now appears as set forth in our Appendix (See: Respondent's Appendix p. 29).

In February, 1957, Louise Lassiter brought an action in the District Court of the United States for the Eastern District of North Carolina against the registrar of the Seaboard Precinct in which she sought to have declared unconstitutional and void the literacy test for voters prescribed by Sec. 4 of Article VI of the Constitution of North Carolina, as well as Sec. 163-28 of the General Statutes of this State. The case was heard, and on June 10, 1957, a three-judge Federal District Court entered an order staying action in the case but retaining jurisdiction for a reasonable time "to enable plaintiffs to take action in the courts of North Carolina to obtain an interpretation of the statute and to exhaust administrative remedies thereunder." The statute referred to is the Registration Statute appearing in the Appendix to this brief on p. 29. The Plaintiff then proceeded to exhaust the administrative remedy and have the matter heard in the Superior Court of Northampton County, and the case is now pending before the Supreme Court of North Carolina, argument having been made and briefs filed (No. 172, Sixth District, Supreme Court of North Carolina, Fall Term, 1957). The Opinion of the three-judge District Court is reported as LASSITER v. TAYLOR, 152 F. Supp. 295. The three-judge Federal District Court in this Opinion called attention to the fact that: "It was shown, without contradiction, that the literacy test was applied by the registrar to white persons and Negroes alike without discrimination * * *." In this same Opinion the Court stated that Article VI, Sec. 4, of the State Constitution was violative of the provisions of the 14th and 15th Amendments of the Constitution of the United States, cited GUINN v. UNITED STATES, 238 U. S. 347, 59 L. Ed. 1340 and MYERS v. ANDERSON, 238 U. S. 368, 59 L. Ed. 1349. The Court took note, however, of the contention that

the grandfather clause no longer had any practical application because of the lapse of time, and the further contention that even if Article VI, Sec. 4, was void the State still had the right to prescribe an educational qualification for suffrage, since the provisions of a State Constitution are limitations on and not grants of power. The Court further noted that 19 States of the Union, only seven of which are southern States, "prescribe educational qualifications for suffrage which are uniformly upheld and that the Supreme Court has approved them, saying in GUINN v. UNITED STATES, supra, 238 U. S. at p. 360, 35 S. Ct. at p. 929:

> " 'No question is raised by the government concerning the validity of the literacy test provided for in the amendment under consideration as an independent standard since the conclusion is plain that that test rests on the exercise of state judgment and therefore cannot be here assailed either by disregarding the state's power to judge on the subject or by testing its motive in enacting the provision.' "

It is submitted, therefore, that the precise question as to the validity of a literacy test in North Carolina has not been nullified and the clear intimation of the District Court is to the effect that such a test is valid. However, the whole matter is now pending before the Supreme Court of North Carolina, and it is anticipated that a decision will soon be handed down and that thereafter the case in the three-judge Federal District Court will continue until all reviews have been exhausted. The Petitioner argues in this proceeding from the viewpoint that the whole constitutional issue as to registration statutes and literacy tests have been settled in his favor, which, of course, is far from the exact situation. The truth of the matter is that the question as to whether under present laws a literacy test in North Carolina is valid is still a question to be determined, and it has not yet been held that such a test is invalid by any court, either State or Federal, and at the present time the rule, as stated in ALLISON v. SHARP, 208 N. C. 477, 184 S. E. 27, is still in force and effect.

(B)

The status of Coram Nobis in North Carolina

The remedy of Coram Nobis has been available in North Carolina and has been recognised for a long time (TYLER v. MORRIS, 20 N. C. 625—1839; ROUGHTON v. BROWN, 53 N. C. 357-1861). In the case of IN RE TAYLOR, 229 N. C. 297, 49 S. E. 2d 749, it was suggested by counsel appointed by the Court that the Writ would be available under the circumstances of that case, which was a situation where the defendant had not been provided with counsel. The case of LASSITER v. HARPER, 32 N. C. 383 was cited and relied upon, and in this same matter upon a subsequent review (IN RE TAYLOR, 230 N. C. 566, 53 S. E. 2d 857 the Supreme Court of North Carolina said that the Writ was available and that the application for same must be addressed to the Supreme Court of North Carolina since it had supervisory authority over the proceedings of the inferior courts of the State (N. C. CONSTITUTION, Article IV, Sec. 8). The Supreme Court of North Carolina further relied upon the fact that the common law is in force in North Carolina and is declared to be so in force by statute.

In STATE v. DANIELS, 231 N. C. 17, 25, 56 S. E. 2d 2, the Supreme Court of North Carolina reviews the recognition that this State has given to the remedy of Coram Nobis and states that the remedy relates to matters extraneous to the record. In STATE v. DANIELS, 231 N. C. 341, 56 S. E. 2d 646, an application for a Writ of Error Coram Nobis was dismissed by the Supreme Court of North Carolina, it appearing that the questions sought to be reviewed were raised at the trial of the case or could have been raised at the trial of the case even though the facts supporting the contentions may have been extraneous to the record, the criminal procedure in force in the State permitting these extraneous facts to be shown by proper motions on the trial of the case with right of review on appeal.

In STATE v. DANIELS, 232 N. C. 196, 59 S. E. 2d 430, after denial for Petition of Certiorari in the Supreme Court of the United States, the Petitioners again applied to the Supreme

Court of North Carolina for a Writ of Error Coram Nobis, which was dismissed, the Court saying:

> "The writ of error *coram nobis* obtains in this Court only by virtue of adoption of the common law; *In re Taylor*, 229 N. C. 297; *In re Taylor*, 230 N. C. 566, *supra*; *S. v. Daniels*, 231 N. C. 17, *supra*; and is attended with its common law limitations.
>
> The writ of error *coram nobis* is not a substitute for appeal. Under our practice permission to petition the Superior Court in which the petitioning defendant was tried is given only when the matter on which the petition is based is 'extraneous to the record.' *S. v. Taylor*, 229 N. C. 297, 49 S. E. 2d 749; *In re Taylor*, 230 N. C. 566; 63 Am. Jur., p. 766, Sec. 1276; 4 C. J. S., Sec. 9."

It is believed that the essential features of procedure and practice in Coram Nobis in force in Florida and Alabama prevail in North Carolina. A naked allegation that a constitutional right has been invaded is not sufficient. A petitioner must "make a full disclosure of the specific facts relied on" and not merely his conclusions "as to the nature and effect of such facts." The facts alleged must be of such a nature that the appellate court can reasonably conclude that there exists in a prima facie manner just ground for an application to the lower court (HYSLER v. FLORIDA, 315 U. S. 411, 86 L. Ed. 932; WASHINGTON v. STATE, 92 Fla. 748, 110 So. 259). In the Hysler case, supra, this Court quotes from McCALL v. STATE, 136 Fla. 340, 350, 186 So. 803 (1939):

> "In the exercise of its discretion in matters of this sort the court should look to the reasonableness of the allegations of the petition and to the existence of the probability of the truth thereof."

Later on the same opinion of this Court said:

> "Such a state procedure of course meets the requirements of the Due Process Clause."

In passing on the Alabama procedure in Coram Nobis (TAYLOR v. ALABAMA, 335 U. S. 252, 92 L. Ed. 1935) this

Court said that the Alabama procedure whereby one of its trial Courts, by Coram Nobis, could set aside its own judgment in a criminal case "because of an error of fact not apparent on the common law record" constitutes due process of law under the Fourteenth Amendment. In speaking of its own scope of review this Court (SUPREME COURT OF THE UNITED STATES) said (TAYLOR v. ALABAMA, supra):

> "The petitioner, however, had no mandatory right to the permission. The issue before us is not the issue which would have faced the trial Court in the event that the Supreme Court of Alabama had granted permission to the petitioner to file his petition for writ of error Coram Nobis in that court. The proceeding here is not even a review, *de novo*, of the merits of the request made to the Supreme Court of Alabama. The issue before us is limited to a determination of whether, under all the circumstances, the action of the Supreme Court of Alabama in denying permission for the petitioner to file his petition not merely had committed error but had deprived the petitioner of life or liberty without due process of law".

In his concurring opinion Mr. Justice Frankfurter explains the factors a state appellate court was entitled to consider in passing upon such a petition, he said:

> "In reaching such a conclusion the Supreme Court of Alabama was entitled to consider the circumstances of the original trial, the manner of its conduct by the trial judge, the professional ability with which the defendant was represented, the behavior of the accused throughout the proceedings, and, in the light of all these circumstances, the weight to be attached to the affidavits on which his present petition is based."

It is within the scope of these principles that we ask this Court to review the decision of the Supreme Court of North Carolina in denying Petitioner's application for permission to apply to the Superior Court of Northampton County for a Writ of Error Coram Nobis.

(C)

Petitioner's allegations do not show that his constitutional rights were violated in his original trial, nor do they show

that he was denied adequate corrective process; he, therefore, does not bring his case within the scope of the remedy of Coram Nobis.

The Petitioner alleges, in substance, as follows:

(1) That although not directly in issue, nevertheless, an unconstitutional statute "plagued and haunted his prosecution and trial."

(2) That this "unconstitutional and oppressive statute" operating by means of an "indirect and subtle application to his prosecution and trial * * * * had the untoward effect of casting constitutionally privileged and commendable conduct on the part of Petitioner in a criminal mold" and thereby rendered "inert and effete" factual matters that would have been a complete defense.

(3) That this "oppressive and unconstitutional statute" by its "interaction and influence" abridged and curtailed his constitutional rights, as a licensed attorney, to question and protest the unconstitutional denial of the rights of his clients; that he was, therefore, penalized as a licensed attorney for upholding the Federal and State Constitutions.

(4) That "the indirect, subtle and invidious interplay of North Carolina General Statutes 163-28, as it read in August, 1956, upon Petitioner's trial and prosecution of August, 1956, was a matter dehors the record, the said statute being the climate surrounding and permeating Petitioner's trial and prosecution rather than an issuable factor therein."

(5) That "Although the statute was not issuable at the Petitioner's trial and prosecution and was not upon the record, its total effect was to nullify Petitioner's defense and to portend a case against him where none existed."

(6) That "the unfairness generated by the indirect and subtle application of a void and invidious statute appears not to have been before this Court in a previous case."

(7) That the statute in question has subsequently been declared unconstitutional. (Respondent denies this conclusion)

(8) That in view of a former decision of the Supreme Court of North Carolina (ALLISON v. SHARP, supra) Petitioner could not set up the invalidity of this statute as a defense; that "the subtlety of the operative effect of the said statute defied its detection in gross."

(9) That this converted his trial into a charge of interfering with a voting registrar and he had no notice of this variance from the crime charged in the bill of indictment.

(10) That under these circumstances he has not waived any rights.

These allegations are "presented in various forms and repeated in various shapes," as if mere words had the talismanic ability to produce an unconstitutional denial of rights. These conclusional allegations stated in the form of cabala never disclose any facts as to how the alleged invalid statute was the efficient cause of this unlawful result. Although G. S. 163-28 was never in issue, never mentioned by counsel for Petitioner or the trial judge, never argued or assigned for error before the Supreme Court of North Carolina, yet by some mysterious process of legal metaphysics this becomes a transmutation amounting to unconstitutional unfairness. How this is accomplished we do not know. We are left in the realm of the esoteric, the occult and the field of speculation. Even counsel for Petitioner say that this so-called evil and infectious influence is so subtle and is of such an attenuated and gossamer nature that it defies detection. We submit that neither this Court or any other court has any legal scales in which to evaluate the qualitative and quantitative elements of this disembodied, incorporeal spectre. This position is utterly lacking in that reasonable degree of tangibility and concreteness required and recognized by courts of law.

This Court has commented on such positions (UNITED STATES v. HANDY, 351 U. S. 454, 100 L. ed. 1331) as follows:

"While this Court stands ready to correct violations of constitutional rights, it also holds that 'it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, *and that it be sustained not as a matter of speculation but as a demonstrable reality.*' ***** Justice Holmes, speaking for a unanimous Court in HOLT v. UNITED STATES, 218 U. S. 245, 54 L. ed. 1021, 1029, 31 S. Ct. 2, 20 Ann. Cas. 1138, cautioned that 'If mere opportunity for prejudice or corruption is to raise a presumption that they may exist, it will be hard to maintain jury trial under the conditions of the present day.'" (Emphasis ours)

The cases dealing with mob violence and its effect in criminal trials (FRANK v. MANGUM, 237 U. S. 309, 59 L. ed. 969; MOORE v. DEMPSEY, 261 U. S. 86, 67 L. ed. 543), as well as inflammatory articles of newspapers (SHEPHERD v. FLORIDA, 341 U. S. 50, 95 L. ed. 740) clearly show the difference between the real and the unknown. We think we can understand these cases because they show real, efficient and causal relationships between the events and the trials which resulted in prejudice and unfairness. In this case we do not and cannot know, and the Petitioner does not tell us, how the potential unconstitutionality of a statute, not in issue and never mentioned at Petitioner's trial, affected the trial judge and jurors to the prejudice of the Petitioner.

Putting to one side all emotional phrases and rhetorical words the Petition really adds up to the following: (1) The Petitioner was convicted in a local State court, on a general charge of an Assault upon a woman, he being a male over 18-years of age, and he was never at any time charged with any offense that had any connection with the Election Laws of the State; (2) Neither the Petitioner nor his counsel ever at any time during the progress of the trial suggested to the Court that North Carolina General Statutes 163-28 was invalid or unconstitutional, nor was this now alleged invalidity ever asserted during the trial as a defense in behalf of the Petitioner; (3) It is not now alleged or pointed out to this Court any specific North Carolina law or precedure which would have prohibited the Petitioner from making such a defense or placing

this statute in issue had he or his counsel chosen to so do; (4) That since Petitioner's trial, dismissal of his appeal, and dismissal of application for Certiorari to review Petitioner's Post-Conviction Hearing proceeding, Petitioner's counsel have brought an action in the District Court of the United States for the Eastern District in behalf of another party, Louise Lassiter, in which it is asserted that North Carolina General Statutes 163-28, as well as North Carolina Constitution Article VI, Sec. 4, are unconstitutional and invalid (LASSITER, et al v. TAYLOR, 152 F. Supp. 295); (5) That Petitioner and his counsel, after thinking over events that have already transpired and in the light of hindsight and afterthought, have conceived the legal theory of the invalidity of the Registration Statute and now wish that they had asserted such a defense and taken such position during the progress of Petitioner's trial, and (6) That by means of an application for Writ of Error Coram Nobis they should now be allowed to assert any legal theory or position that they have subsequently thought of and which they did not present at Petitioner's trial, either because they had no knowledge of same at that time or neglected to do so.

The primary and essential question is: Did the State of North Carolina afford the Petitioner "an opportunity to open an inquiry" if his counsel desired to do so?" It is submitted that North Carolina does not have mere "abstract rubrics in an elegant code" but that an impartial examination of the procedural aspects of our Criminal Code will show that our "procedural instruments are means for achieving the rational ends of law." In his allegations the Petitioner does not, and indeed he cannot, point to any procedural obstacles that would have prevented him from placing this statute in issue as a defense had his counsel wished to do so. The only excuse that Petitioner presents is that the Supreme Court of North Carolina in a constructive manner misled him by its decision in ALLISON v. SHARP, supra, but it is never shown how this prevented Petitioner from attacking any statutes he chose to attack as being in violation of the Federal Constitution or even again raising the question as to the validity under the North Carolina Constitution. It is submitted that this Court

has already made a decision contrary to the Petitioner's present position (BROWN v. ALLEN—NO. 20; BENNY DANIELS and LLOYD RAY DANIELS, Petitioners, 344 U. S. 443, 9 L. ed. 469). Under the North Carolina Practice the Petitioner could have raised this question by a motion to quash the bill of indictment, by a motion to dismiss (which under our practice is usually called a motion for judgment as of nonsuit), or by a request for special instructions to the jury (STATE v. CLYBURN, et als, 247 N. C. 455—Advance Sheets of Cases No. 4,———, S. E. 2d———).

Assuming that the literacy test as then provided by the North Carolina Statutes was void, it is not shown how the whole registration process was void. The registrar would certainly, even under Petitioner's theory, be a *de facto* officer charged with the duty of at least entering the names of prospective voters on the registration books regardless of the literacy test. The registrar was busy with another person who had applied for registration, and the Petitioner would not give her time to consider his position because the Petitioner was too busy shaking his finger in her face. No action has ever been taken by the State of North Carolina to curtail Petitioner's privileges as a licensed attorney. The registrar had a right to finish with the applicant before her and then hear the Petitioner's application and position in behalf of his clients. The action of the registrar was nothing more than that of a judge of any court in fixing a reasonable time in which to hear an attorney. The Petitioner is still practicing law in Northampton County and any position that his constitutional rights as an attorney have been infringed is utterly ridiculous.

The unconstitutionality of North Carolina General Statutes 163-28, as well as North Carolina Constitution, Article VI, Sec. 4, is not a fact extraneous to or *dehors* the record. It is a question of law considering the face of the statute and its administration. It is clear that such a situation is not within the scope or purview of an application for Writ of Error Coram Nobis and the cases cited below contain good statements of when such a writ is available:

PEOPLE v. BOWERS, 156 N. Y. S. 2d 82, 84 (N. Y.);
LAMB v. STATE, 107 So. 535 (Fla.);
ASBELL v. STATE, 61 P. 690 (Kans.);
STEPHENSON v. STATE, 186 N. E. 293 (Ind.);
PEOPLE v. MOONEY, 174 P. 325 (Calif.);
PEOPLE v. BLACK, 300 P. 43 (Calif.);
PEOPLE v. KENDRICKS, 75 N. Y. S. 2d 216 (N. Y.);
10 Nebraska Law Review 314;
24 C. J.S. (Criminal Law) p. 143, Sec. 1606;
31 Am. Jur. (Judgments) p. 321, Sec. 798;
Frank: Coram Nobis, p. 23, Sec. 301.

The real motive of the Petitioner, so far as his personal interest in the case is concerned, is to obtain a review of his criminal trial by means of a Writ of Error Coram Nobis as a substitute for an appeal, and under all of the authorities this is not proper.

STATE v. DANIELS, 232 N. C. 196, 59 S. E. 2d 430;
BERRY v. STATE, 173 N. E. 705 (Ind.);
COLLINS v. STATE, 71 P. 251 (Kans.);
PEOPLE v. KENDRICKS, 75 N. Y, S. 2d 216 (N. Y.);
UNITED STATES v. STURM, 180 F. 2d 413;
TAYLOR v. UNITED STATES, 177 F. 2d 194, 195;
PEOPLE v. GAMBOA, 301 P. 2d 390, 392 (Calif.);
UNITED STATES v. ROBINSON, 143 F. Supp. 286, 294;
UNITED STATES v. ROSENBERG, 200 F. 2d. 666;
DAVIS v. UNITED STATES, 214 F. 2d 594.

The Writ of Error Coram Nobis is never available to test newly conceived questions of law which occur to counsel subsequent to a trial. It always relates to facts extraneous to the record, unknown at the time of the trial, and which, if known, would have prevented the entry of the judgment. Even as to such extraneous facts they are not available on Coram Nobis if the defendant was at fault or failed in the exercise of reasonable diligence to make such facts known. The fact is that most every conscientious trial lawyer after a trial is over and in the process of afterthought in many instances can think of new concepts and legal theories which he wished he had

thought of and asserted at the time of trial. This is a phantom that always rides behind the active trial lawyer and no doubt will always dog his footsteps even though he fought hard and conscientiously at the time of the trial. That the Writ is not available to test out newly conceived legal theories and positions, see:

PELLY v. UNITED STATES, 214 F. 2d 597;
UNITED STATES v. CORNETT, 142 F. Supp. 764, 769;
PEOPLE v. DONAHOE, 223 Ill. App. 277, 283;
PEOPLE v. KRETCHMAR, 72 P. 2d 243 (Calif.);
MANDELL v. PEOPLE, 231 P. 199, 202 (Calif.);
PEOPLE v. BRUNO, 179 N. E. 129 (Ill.);
JACOBSON v. ASHKINEZ, 168 N. E. 647, 649 (Ill.);
STRANG v. UNITED STATES (C. C. A.-5) 53 F. 2d 820;
COLLINS v. STATE, 97 Am. State Rep. 361, note p. 369;
ALEXANDER v. STATE, Ann. Cas. 1915-A, p. 1282, note p. 1287;
PEOPLE v. SADNESS, 89 N. E. 2d 188 (N. Y.);
PEOPLE v. COLE, 312 P. 2d 701, 703 (Calif.);
PEOPLE v. AYALA, 291 P. 2d 517, 518 (Calif.);
PEOPLE v. CULINA, 162 N. Y. S. 2d 123, 124.

As we have shown, the Writ of Error Coram Nobis applies to facts and not to law and is not available to correct the mistakes of counsel. In the case of STATE v. LATSCHAN, 237 S. W. 770, 772 (Mo.) on this point the Court said:

> "While the writ of error coram nobis will lie to correct errors of fact which, if before the court, would have prevented the adjudication, nevertheless, it will not lie where the applicant, at the trial of or before the trial, knew the fact complained of, or by the exercise of reasonable diligence might have known it, or would otherwise be guilty of negligence."

See also:

DOBBS v. STATE, 65 P. 658, 659 (Kans.);
PEOPLE v. OGDEN, 13 N. E. 2d 162, 163 (Ill.);
DUSENBERG v. RUDOLPH, 30 S. W. 2d 94, 95 (Mo.);

HOLFORD v. ALEXANDER, 46 Am. Dec. 253, note pp. 257, 260;
STATE v. BOYD, 58 A. L. R. 1283, note p. 1286;
PEOPLE v. CARROLL, 309 P. 2d 128, 129 (Calif.)

In SUNAL v. LARGE, 332 U. S. 174, 182, 91 L. ed. 1982, counsel for defendant had raised the point, subsequently asserted, but at that time this Court did not think the point valid. In a later case this Court took a different view and counsel for the defendant in the Sunal case again tried to raise the same point by Habeas Corpus. In dismissing the application for the Writ, this Court said:

"The Supreme Court in the case of Sunal v. Large, 332 U. S. 174, 182, 67 S. Ct. 1588, 1592, 91 L. ed. 1982, said—'It is not uncommon after a trial is ended and the time for appeal has passed to discover that a shift in the law or the impact of a new decision has given increased relevance to a point made at the trial but not pursued on appeal. Cf. Warring v. Colpoys, supra (74 App. D. C. 303, 122 F. 2d 642, 136 A. L. R. 1025). If in such circumstances, habeas corpus could be used to correct the error, the writ would become a delayed motion for a new trial, renewed from time to time as the legal climate changed. Error which was not deemed sufficiently adequate to warrant an appeal would acquire new implications. Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by habeas corpus, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.'

"The defendant in this case, represented by competent counsel of his own selection and employment, accepted the judgment of conviction and did not prosecute an appeal. Hence, the doctrine of the Sunal case is applicable, that is, Section 2255 of Title 28 cannot be the means of affording a substitute for an appeal."

The Supreme Court of North Carolina has held many times

that constitutional rights can be waived and has recognized such waivers in many cases:

EX PARTE STEELE, 220 N. C. 685 (Cert. Den. 316 U. S. 686, 86 L. ed. 1758);
STATE v. ANDERSON, 228 N. C. 720, 47 S. E. 2d 1
STATE v. HARTSFIELD, 188 N. C. 357, 124 S. E. 629.

This Court also recognizes that constitutional rights may be waived in criminal cases, see:

PARKER v. ILLINOIS, 333 U. S. 471, 92 L. ed. 886;
JENNINGS v. ILLINOIS, 342 U. S. 104, 96 L. ed. 119;
YAKUS v. UNITED STATES, 321 U. S. 414, 444, 88 L. ed. 834.

The lower federal courts on the question of waiver of constitutional rights are in accord with the above cited cases, see:

KEY v. UNITED STATES, 26 F. 2d 241;
UNITED STATES v. HOYT, 53 F. 2d 881;
UNITED STATES v. NAPELA, 28 F. 2d 898.

The decisions of the Supreme Courts of the various States are to the same effect, see:

EX PARTE MONTOW, 236 P. 2d 509 (Okla.);
LENOIR v. STATE, 80 A. 2d 3 (Md.);
STATE v. GRIFFITH, 81 A. 2d 382 (N. J.).

In LENOIR v. STATE, supra, in dealing with this question, the Court said, quoting with approval from U. S. EX REL JACKSON v. BRADY, supra, and also quoting in KLICKMAN v. STATE, 190 Md. 516, 526, 60 A. 2d 216, as follows:

"Where, in a State criminal trial, the defendant is represented by competent and experienced counsel, even constitutional rights known or presumed to be known to counsel to exist must be held to have been waived if not made at all or inadequately presented."

The same rule has been applied by this Court in the case of YAKUS v. UNITED STATES, 321 U. S. 414, 88 L. ed. 834, where this Court said:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neal v. Vermont, 144 U. S. 323, 331, 36 L. ed 450, 455, 12 S. Ct. 693; Barbour v. Georgia, 249 U. S. 454, 460, 63 L. ed 704, 707, 39 S. Ct. 316; Whitney v. California, 274 U. S. 357, 360, 362, 380, 71 L. ed. 1095, 1099, 1100, 1107, 47 S. Ct. 641. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U. S. 86, 77 L. ed. 180, 53 S. Ct. 32, 86 ALR 174. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in Whitney v. California, supra (274 U. S. 380, 71 L. ed 1107, 47 S. Ct. 641), and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare Woolsey v. Best, 299 U. S. 1, 81 L. ed. 3, 57 S. Ct. 2, with Ex parte Siebold, 100 U. S. 371, 25 L. ed. 717."

Ordinarily whether or not a question is properly presented to a state court the decision should be determined by applying state laws and rules of court, see:

> TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572;
> JOHN v. PAULLIN, 231 U. S. 583, 58 L. ed. 381.

Since the Petitioner intimates that there is a variance in the charges from that expressed in the indictment we assert that whether or not an indictment is sufficient under the Constitution and Laws of the State is not a Federal question, see:

> BARRINGTON v. MISSOURI, 205 U. S. 483, 51 L. ed. 890;
> IN RE ROBERTSON, 156 U. S. 183, 39 L. ed. 390.

The question of whether or not there was sufficient ev-

idence to be submitted to the jury does not present a substantial federal question, see:

NOBLE v. MITCHELL, 164 U. S. 367, 41 L. ed. 472;
BELL TELEPHONE CO. v. PA. PUBLIC UTILITY COMMISSION, 309 U. S. 30, 84 L. ed. 563.

CONCLUSION

If the Petitioner can be authorized by this Court and under this Petition to make the Writ of Error Coram Nobis applicable to such a situation in North Carolina, then this Court must do so with the thought in mind that there will be no end to litigation in criminal cases. Every lawyer who thinks he has a better afterthought about a case that has been tried or who suddenly has an insight into a new theory or position that he considers that he should have tried out in a case that is now ended will besiege this Court with writs to test his new-found concepts. As said in the case of COLLINS v. STATE, supra,: "We cannot invent forms of procedure to relieve unfortunate suitors", and how true this is where the forms of procedure of this State conform to all phases of due process and afford a defendant every right to present every position available. On this point the Supreme Court of Florida (CHESSER v. STATE, 109 So. 906, 907) said:

> "The application of the writ for the purpose of obtaining redress in those cases where it was and is intended to apply is wise and salutory, but its scope cannot be extended without grave danger of its becoming a menace to the enforcement of the law, an ever ready barrier for the obstruction of justice and the vehicle for the escape of the guilty. The courts and the lawmakers of the country should, therefore, carefully guard the extent of its application and confine it to those well-fixed purposes for which it was originally intended and beyond which the courts and the lawmakers in the past have not allowed its use."

In PEOPLE v. LEMPIA, 301 P. 2d 40, 43 (Calif.), the California Court, in speaking of the use of it, said:

> "A writ of error coram nobis is not a catch-all by means of which those convicted of crime may litigate and relitigate the propriety of their convictions *ad infinitum*."

In PEOPLE v. HAYMAN, 302 P. 2d 810, 812 (Calif.), the Court said:

> "It is not a writ (coram nobis) whereby convicts may attack or relitigate just any judgment on a criminal charge merely because the unfortunate person may become displeased with his confinement or with any result of the judgment under attack. (Citation Omitted) It is not properly used to correct errors of law or to redress irregularities at the trial that could have been corrected on motion for new trial or by appeal. On the contrary, it is a process whose scope is extremely narrow and must be confined to an inquiry and to those facts which might have been properly defensive matter at the trial but for the interposition of some other agency than negligence of the petitioner. *** Neither may the writ of error coram nobis be used for the purposes of appeal because that remedy was lost through failure to invoke it in time without fault on the part of the petitioner."

See also:

PEOPLE v. FRITZ, 295 P. 2d 449 (Calif.).

This is a discretionary writ and is to be considered within the sound discretion of the Court as to whether it will be issued or not. HENDRICKS v. STATE, 297 P. 2d 576 (Okla.). That a writ is discretionary, see also ERNST v. STATE, 193 N. W. 978.

Upon all the facts in this case we think it is clear that this Petition should be dismissed.

Respectfully submitted,

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APPENDIX

NORTH CAROLINA GENERAL STATUTES, SEC. 14-33

Sec. 14-33. *Punishment for assault.*—(a) In all cases of an assault, with or without intent to kill or injure, the person convicted shall be punished by fine or imprisonment, or both, at the discretion of the court, subject to the provisions of subsection (b).

(b) Notwithstanding the provisions of subsection (a), the punishment in cases of assaults, assaults and batteries, and affrays shall not exceed a fine of fifty dollars ($50.00) or imprisonment for thirty days, when no deadly weapon has been used and no serious damage done except in cases of:

(1) Assault with intent to kill, or

(2) Assault with intent to commit rape, or

(3) Assault or assault and battery by any man or boy over eighteen years old on any female person, or

(4) The person committing the assault, (excluding and excepting parents, school teachers, guardians or persons in loco parentis), is eighteen ears old or over, and the person on whom the assault is committed is under the age of twelve years.

ARTICLE 22

REVIEW OF THE CONSTITUTIONALITY OF CRIMINAL TRIALS

Sec. 15-217. *Institution of proceeding; service of petition upon solicitor.*— Any person imprisoned in the penitentiary, Central Prison, common jail of any county or imprisoned in the common jail of any county and assigned to work on the roads and highways of the State under the supervision of the State Highway and Public Works Commission, who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of North Carolina, or both, as to which there has been no prior adjudication by any court

of competent jurisdiction may institute a proceeding under this article. The proceeding shall be commenced by filing with the clerk of the superior court of Wake County, or in any county in which the conviction took place, a petition with a copy thereof, verified by affidavit. The petitioner shall serve another copy upon the solicitor of the solicitorial district who prosecutes the criminal docket of the superior court of the county in which said petition is filed, and said service of petition shall be by any of the methods provided by law for the service of process or by mailing said petition to the home address of said solicitor by registered mail, with return receipt requested. If said copy of petition is served by registered mail, the return receipt shall be filed with the clerk of the superior court of the county in which said petition is filed. The clerk shall place upon the criminal docket the petition upon his receipt thereof, and after service of the petition upon the solicitor of the district as above provided. No proceeding under this article shall be commenced more than five years after rendition of final judgment resulting from said conviction, or more than three years after the effective date of this article, whichever is later, unless the petitioner alleges facts showing that the delay was not due to laches or negligence on his part.

RULE 5 OF THE RULES OF PRACTICE OF THE SUPREME COURT OF NORTH CAROLINA

Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: Provided, however, that an appeal in a civil case from the First, Second, Third, Fourth, Fifth, Sixth, Twenty-seventh, Twenty-eighth, Twenty-ninth and Thirtieth districts which is tried between the first day of January and the first Monday in February or between the first day of August and the fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument. All criminal cases from the foregoing district which are tried between the first day of January and the first Monday in February, and between the first day of August and the fourth Monday in Au-

gust must be docketed within forty-five days from the last day of the term at which the respective cases were tried.

NORTH CAROLINA GENERAL STATUTES RELATING TO REGISTRATION REQUIREMENTS EFFECTIVE APRIL 12, 1957.

Sec. 163-28 *Voter must be able to read and write; registrar to administer section.*—Every person presenting himself for registration shall be able to read and write any section of the Constitution of North Carolina in the English language. It shall be the duty of each registrar to administer the provisions of this section.

Sec. 163-28.1. *Appeal from denial of registration.*—Any person who is denied registration for any reason may appeal the decision of the registrar to the county board of elections of the county in which the precinct is located. Notice of appeal shall be filed with the registrar who denied registration, on the day of denial or by 5:00 P. M. on the day following the day of denial. The notice of appeal shall be in writing, signed by the appealing party, and shall set forth the name, age and address of the appealing party, and shall state the reasons for appeal.

Sec. 163-28.2. *Hearing on appeal before county board of elections.*—Every registrar receiving a notice of appeal shall promptly file such notice with the county board of elections, and every person appealing to the county board of elections shall be entitled to a prompt and fair hearing on the question of such person's right and qualifications to register as a voter. A majority of the county board of elections shall be a quorum for the purpose of hearing appeals on the question of registration, and the decision of a majority of the members of the board shall be the decision of the board. All cases on appeal to a county board of elections shall be heard de novo, and the board is authorized to subpoena witnesses and to compel their attendance and testimony under oath, and is further authorized to subpoena papers and documents relevant to any matters pending before the board. If at the hearing the board shall find that the person appealing from the decision of the registrar

is able to read and write any section of the Constitution of North Carolina in the English language and if the board further finds that such person meets all other requirements of law for registration as a voter in the precinct to which application was made, the board shall enter an order directing that such person be registered as a voter in the precinct from which the appeal was taken. The county board of elections shall not be authorized to order registration in any precinct other than the one from which an appeal has been taken. Each appealing party shall be notified of the boards decision in his case not later than ten (10) days after the hearing before the board.

Sec. 163-28.3. *Appeal from county board of elections to superior court.*—Any person aggrieved by a final order of a county board of elections may at any time within ten (10) days from the date of such order appeal therefrom to the superior court of the county in which the board is located. Upon such appeal, the appealing party shall be the plaintiff and the county board of elections shall be the defendant, and the matter shall be heard de novo in the superior court in the same manner as other civil actions are tried and disposed of therein. If the decision of the court be that the order of the county board of elections shall be set aside, then the court shall enter its order so providing and adjudging that such person is entitled to be registered as a qualified voter in the precinct to which application was originally made, and in such case the name of such person shall be entered on the registration books of that precinct. The court shall not be authorized to order the registration of any person in a precinct to which application was not made prior to the proceeding in court. From the judgment of the superior court an appeal may be taken to the Supreme Court in the same manner as other appeals are taken from judgments of such court in civil actions.